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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 893

STATE OF MINNESOTA EX REL. ARTHUR B. KONS
Petitioner

VS.

RALPH H. TAHASH, WARDEN MINNESOTA STATE PRISION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RISCHMILLER & WASCHE
BY ROBERT WM. RISCHMILLER
302 Minnesota Federal Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner

333-3539 Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415 333-3530

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VS.

RALPH H. TAHASH, WARDEN MINNESOTA STATE PRISION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Arthur B. Kons, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota which was entered on October 4, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 161 N. W. 2d 826, and is set forth in our appendix, pp. A-4 - A-13.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C.*, s. 1257 (3). The final judgment of the Minnesota Supreme Court affirming the Habeas Court's order dismis-

sing and discharging the Writ of Habeas Corpus was entered on October 4, 1968.

QUESTIONS PRESENTED

1. Did Minnesota accord the accused his right to the assistance of counsel within the meaning of the U. S. Constitution (murder second degree) where, the first time accused's request for counsel was honored occurred at the time of his arraignment; where, while the court remained on the bench and without recess, the court appointed counsel conferred with accused for three to four minutes in the courtroom; where, court appointed counsel immediately thereafter entered a plea of guilty on behalf of the accused; and where, with no questioning concerning the facts of the alleged charge, the accused was sentenced to life imprisonment?

2. Did Minnesota violate Petitioner's constitutional right to assistance of counsel in a Habeas Corpus case where it stated:

> "Unless defendant is denied a constitutional right which is prejudicial *and casts doubt on his guilt or innocence,* procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted"? (Emphasis ours.)

CONSTITUTIONAL PROVISIONS

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 13, 1941, petitioner was indicted by the grand jury of Goodhue County, Minnesota for murder in the second degree. On said date, he was sentenced to life imprisonment and has been in the Minnesota State Penitentiary located at Stillwater, Minnesota up to the present time.

A petition for Writ of Habeas Corpus was filed September 15, 1964. A first evidentiary hearing was had in Washington County District Court on March 19, 1965 and a second evidentiary hearing was held on April 12, 1966. On March 10, 1967 an order was entered dismissing petitioner's writ and an appeal was taken to the Minnesota Supreme Court on April 3, 1967. The case on appeal was orally argued before the Minnesota Supreme Court on

April 4, 1968. Final judgment of the Minnesota Supreme Court was entered Oct. 4, 1968 affirming the District Court order dismissing petitioner's writ.

STATEMENT OF FACTS

Arthur B. Kons, petitioner (hereinafter referred to as the accused) was arrested on his counsin's farm near Stevens Point, Wisconsin by a Minnesota Crime Bureau agent on January 9, 1941 (R. 14, ll. 3, 4). He was incarcerated at the county jail at Stevens Point. The accused at that time requested counsel, a former county attorney from Stevens Point, Mr. Mush Moran (R. 18, ll. 13-21). He was not permitted to call Mr. Moran nor was Mr. Moran contacted by anyone else on the accused's behalf (R. 19, ll. 8-17).

The accused was taken by the Minnesota Crime Bureau agent from Stevens Point, Wisconsin to Red Wing, Minnesota on January 10, 1941. The accused claims he did not waive extradition (R. 25, l. 21). There is no evidence of any extradition proceedings or a waiver of extradition although respondent herein claims the accused came back to Minnesota with the Minnesota Crime Bureau agent voluntarily.

On January 10th or 11th, 1941, the accused requested counsel at Red Wing, Minnesota (R. 23, l. 3). He asked to see Attorney Arntson of Red Wing but was told by the sheriff he would get a lawyer when the right time came (R. 23, l. 3). The accused was not permitted to call Attorney Arntson (R. 24, ll. 10-12).

On January 13, 1941 at 11:00 a. m. the grand jury was called (R. 87, ll. 22-24; R. 88, ll. 1-10). Roll call was taken and they began their deliberation. The county attorney, in seeking an indictment against the accused for mur-

der in the second degree, presented evidence to the grand jury claiming the accused had also been guilty and convicted of arson, larceny and slugging, all of which were unrelated to the matter contained in the instant charge (R. 110; R. 113).

At 2:20 p. m. of the same date (January 13, 1941) the grand jury returned a true bill (R. 88, ll. 14-22). The accused was then brought up from the county jail into the courtroom. The county attorney moved for the arraignment of the accused on the indictment. The accused was not given a copy of the indictment (R. 35, ll. 12-15; Respondent's Exhibit 2). The accused requested counsel and the court instructed the county attorney to have one Mr. Bently "come up at once".

Mr. Bently (the court appointed counsel) talked to the accused for three to four minutes in the courtroom (R. 33, ll. 16-17; R. 35, ll. 16-20). All during this brief conference, the court remained on the bench and no recess was taken (R. 35, ll. 16-20; Respondent's Exhibit 2). This was the first time the accused had met Attorney Bently (R. 32, ll. 23-24). At the time of arraignment and sentencing which immediately followed this brief conference, the accused was not asked any questions by the court or by the county attorney concerning the crime of which he was charged (R. 36, ll. 21-25; Respondent's Exhibit 2). The court appointed counsel did not ask the accused any questions concerning the crime (R. 36, ll. 21-25). After the indictment was read, the court appointed counsel entered a plea of guilty on behalf of the accused, which plea the accused claims not to have authorized (R. 33, ll. 18-20).

The court thereupon sentenced the accused to life imprisonment. He was taken to the county jail. He requested

to see Mr. Bently (R. 37, ll. 21-25) which request was refused (R. 38, ll. 1-4).

The accused was then (that same afternoon of January 13, 1941) taken from Red Wing, Minnesota to Stillwater and committed. The prison dental record shows the accused was received on January 13, 1941 (R. 79, ll. 24-25 through R. 80, ll. 1-4; Petitioner's Exhibit A). The witness, Mr. Farnham (records officer at the state prison) who at the time was employed at the prison in the parole section (R. 75, ll. 11-14) was not certain if the date on the dental record meant the prisoner had been in the dental office on that date or whether the date merely referred to the date on which the prisoner was admitted to the institution (R. 79, ll. 18-22).

The prison dental and hospital section closed about 4:00 p. m. (R. 76, ll. 8-9). The accused says he was seen at the prison hospital the same day he was committed (R. 41, ll. 7-12; R. 42, l. 16).

The accused claims to have been working for his freedom since the day he was committed (R. 64, l. 18 through R. 65, l. 6).

ARGUMENT

I.

Arthur B. Kons, in his conviction of murder in the second degree, was denied the assistance of counsel within the meaning of both the United States Constitution and the Minnesota Constitution.

In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel in his defense, and shall not be held to answer for a criminal offense without

due process of law. *United States Const.* Amend. 14 and *Minn. Const.* Art. I, §§ 6, 7.

The right to counsel cannot be nullified by appointment of counsel who merely furnishes perfunctory or casual representation. The instant case is squarely in point. The law with regard to an accused's right to counsel was succinctly stated by our Minnesota Supreme Court in *State v. Rigg,* 251 Minn. 120, 86 N. W. 2d 723, 724, 726, as follows:

> "Right to assistance of counsel carries with it requirement that consultations with counsel be sufficiently adequate to at least inform the accused of his legal rights. M.S.A. Const. art. 1, §§ 6, 7."
>
> "Purpose of right to counsel is to protect the accused from a conviction resulting from his own ignorance of his legal and constitutional rights; and right to counsel cannot be nullified by appointment of counsel who merely furnishes perfunctory or casual representation. M.S.A. Const. art. 1, §§ 6, 7."
>
> "Accused is entitled to be advised by counsel as to all his legal rights under the law and facts involved, including the right to require State to prove every material allegation of offense charged."

The following facts stand undisputed, undenied by the state, and appear as part of the records in this case independent of any testimony on the part of the accused:

1. The grand jury returned with a true bill at 2:20 p. m. on January 13, 1941.

2. The accused was brought up from the county jail to the courtroom shortly thereafter.

3. The accused was not given a copy of the indictment as far as the transcript shows.

4. The accused requested the assistance of counsel.

5. The trial court selected counsel for the accused and instructed the county attorney to have said court appointed counsel appear before the court at once.

6. The trial court remained on the bench during the period of time that the court appointed counsel conferred with the accused. (The record does not indicate that a recess was taken, however, a series of lines appear in the record between the appointment of counsel and the arraignment. The fact that the court stayed on the bench was testified to by the accused. The county attorney, present at the evidentiary hearings of the habeas corpus proceeding, did not deny that the court remained on the bench as above stated. The clerk of the trial court also testified at the habeas corpus proceedings and did not deny that the trial court stayed on the bench at the time aforesaid.)

7. A conference between the court appointed counsel and the accused lasted only three to four minutes in the courtroom. (This was testified to by Kons, stands undenied by the prosecuting attorney who testified at the habeas corpus proceedings and is undenied by the t[illegible]ourt's clerk who also testified at the habeas cor[illegible]roceedings. Further support is found in the tr[illegible]p. of the proceedings itself.)

8. That the trial court was aware of the brevity of the conference between the court appointed counsel and accused.

9. No questions were asked of the accused relating to any act on his part associating him with the

crime charged at the time of arraignment or sentencing. The court appointed counsel did not ask any questions on that point, the prosecuting attorney asked no questions on that point nor did the court question the accused with reference thereto.

10. The court immediately imposed a life sentence.

11. The accused was taken from Red Wing, Minnesota to the Minnesota State Prison at Stillwater, Minnesota on the same date.

12. That the prison dental records show he was received on January 13, 1941, the same date he was sentenced. (The accused claims that he was examined at the dental office on the afternoon of January 13, 1941. This fact is not denied by the prison records officer who testified that this was possible if the accused had been admitted in time, however, he did not believe that the dental record per se established conclusively that the accused was in fact seen at the dental office on that date.)

13. The prison dental facilities closed shortly before 4:00 p. m.

If the accused was in fact seen at the dental office on the day he was sentenced, one hour and forty minutes would have elapsed totally from the time the grand jury brought in a true bill at Red Wing, Minnesota until he had been incarcerated at the Minnesota State Prison at Stillwater, Minnesota. During this one hour and forty minutes the accused was brought into court, had counsel appointed for him, conferred with counsel, had a plea of

guilty entered by counsel, sentenced, transported from Red Wing to Stillwater, Minnesota and had admitting procedures at Stillwater virtually completed.

In addition to the facts above referred to, the accused's testimony adds the following facts:

1. He requested counsel at the time he was arrested at Stevens Point and was denied the right to call or contact said lawyer.

2. The accused requested counsel upon arrival at Red Wing and was denied the right to contact counsel at Red Wing.

3. There is no record of any extradition proceedings or waiver of extradition proceedings relating to the removal of the accused from Wisconsin to Minnesota. (The state does not claim there were any such proceedings but rather claims that the accused voluntarily returned with the Minnesota Crime Bureau agent, which fact the accused denies.)

4. The accused, when brought into the courtroom and throughout the entire proceedings was handcuffed.

5. The accused at no time authorized the court appointed counsel to enter a plea of guilty to the charge of murder in the second degree.

6. That immediately upon being returned to the county jail following sentencing, the accused asked to see his court appointed counsel for purposes of appeal. The accused was denied his right to see counsel.

7. The only questions asked the accused by his court appointed counsel at the time of the brief con-

ference in the courtroom related to whether or not the accused had any property that he could put up and that at no time did the court appointed counsel discuss with him the nature of the offense or the rights afforded a person charged with the commission of this crime.

It is respectfully urged that under the circumstances of this case, independent of any testimony on the part of Mr. Kons, that it would be impossible for court appointed counsel to have properly advised the accused with respect to the nature of the proof that would be required of the state, the elements of the crime involved, explain to the accused the remedies for failure on the part of the state to extradite him, the fact that he was presumed innocent until proven guilty beyond a reasonable doubt, his right to a trial by jury, his right to the assistance of counsel throughout the course of the trial, his right to investigate the validity of the indictment, his right to appeal. In addition, it would be impossible, within the time allowed, for court appointed counsel to become sufficiently familiar with the facts and circumstances so as to properly advise the accused with respect to entering a plea of any kind.

In *State v. Osgood*, 266 Minn. 315, 123 N. W. 2d 593, the defendant claimed he had only a brief conference with counsel prior to arraignment. The Supreme Court remanded for a further hearing upon the particular facts of the case stating that the right to counsel cannot be nullified by counsel who merely furnishes perfunctory or casual representation and that the *right requires that consultations with counsel be sufficiently adequate* to inform the accused of all his legal rights under the law and facts involved. This case was cited with approval in the case of *State of*

Minnesota v. Waldron, 273 Minn. 57, 139 N. W. 2d 785.

In *State ex rel. Grattan v. Tahash*, 262 Minn. 18, 113 N. W. 2d 342, where counsel had consulted with defendant only thirty minutes the Supreme Court held the representation given him was so inadequate as to be a denial of due process. Other cases dealing with the elements of adequate time are: *State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N. W. 2d 1; *State ex rel. Bennett v. Rigg*, 259 Minn. 437, 107 N. W. 2d 707; *and State v. Osgood*, 266 Minn. 315, 123 N. W. 2d 593.

In the *Butler* case the Minnesota Supreme Court stated the following rule as to adequate time for preparing a defense:

> "* * * It is also clear that the due process requirements of U. S. Const. Amend. XIV, as well as those of Minn. Const. art. 1, Sec. 7, are satisfied if counsel is appointed *in sufficient time to assure an adequate preparation of the defense*" (emphasis ours).

In that same case the Court stated:

> "* * * A judgment will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretence rather than a real judicial proceeding."

II.

On this record, the trial court did not have jurisdiction to accept a plea of guilty by court appointed counsel on behalf of the accused nor did the trial court have jurisdiction to impose sentence.

As stated in *State v. Rigg, supra,* the right to counsel cannot be nullified by appointment of counsel who merely

furnishes perfunctory or causal representation. The instant case is squarely in point and falls squarely within the line of cases where an accused has been denied the assistance of counsel.

The denial of the assistance of counsel effectively strips the protective mantle of due process of law from the accused. This deprivation of due process terminates the court's jurisdiction and stands as a bar to a valid conviction.

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A L.R. 357;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527;
Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969;
Cases cited with approval in *State v. Utecht,* 221 Minn. 145, 21 N. W. 2d 328.

In the cases referred to above, the denial of the assistance of counsel, unless intelligently waived, is a failure to complete the court. The printed record of the proceedings affirmatively establishes that the accused in the instant case did not waive counsel but rather requested counsel. Had the accused waived the assistance of counsel, then counsel would have no authority to enter a plea on behalf of the accused.

In discharging the writ, the Honorable Robert Gillespie attached a memorandum explaining the basis of his order (App. B. p. B-4). He stated that ". . . *Because of the short period of time for consultation there is raised a serious question of whether counsel had sufficient time to adequately advise petitioner of his constitutional rights*" (em-

phasis ours). Later in the memorandum, the court resolves this serious question against the accused because, ". . . *He spent at least nine years in prison and it is fair to assume became (during that time) fully acquainted with a defendant's rights in a criminal case* . . ." (emphasis ours) with the clear inference that nine years in prison qualifies the accused himself as competent counsel on constitutional and criminal law as the same pertains to a charge of murder in the second degree and, therefore, the accused was not entitled to more than the three or four minutes conference with counsel. (The accused having had an 8th grade education—Respondent's Exhibit 2.)

It is of more than passing interest to note the basis upon which the indictment was obtained. The county attorney testified in the habeas corpus proceedings that in order to obtain an indictment against the accused he presented evidence to the grand jury relating to a prior conviction of the accused on a charge of larceny, which crime had no relationship to the charge contained in the indictment. The county attorney further presented evidence to the grand jury of a prior conviction for slugging and arson, also both of which had no bearing on the crime involved in the indictment (R. 112-113). The introduction of this evidence to the grand jury was clearly improper and prejudicial to the rights of the accused under *M.S.A.* 628.59 which reads in part as follows:

> "In the investigation of a charge for the purpose of indictment or presentment, the grand jury shall receive no other evidence than:
>
> (2) Legal, documentary or written evidence.
>
> It shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary

evidence, except when such evidence would be admissible on the trial of the accused for the offense charged. . . ."

Our Minnesota Supreme Court has repeatedly ruled:

". . . that evidence which in any manner tends to show that defendant has committed a crime independent of that for which he is on trial is ordinarily inadmissible."

State v. Martineau, 257 Minn. 334, 101 N. W. 2d 410, 415; *State v. DePauw,* 246 Minn. 91, 74 N. W. 2d 297; *State v. Gavle,* 234 Minn. 186, 48 N. W. 2d 44.

III.

The Minnesota Supreme Court erred in requiring that petitioner not only establish that he was prejudicially denied a constitutional right to the assistance of counsel but in addition therto, require that defendant offer evidence which would cast doubt on his guilt or innocence in the habeas corpus proceeding.

The Minnesota Supreme Court stated, "Unless defendant is denied a constitutional right which is predudicial *and casts doubt on his guilt or innocence,* procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted".

If the Minnesota Supreme Court is correct, then the right of an accused against self-incrimination, the right to remain silent and the right to require that the State prove his guilt or innocence beyond a reasonable doubt would be meaningless. Instead, the accused would have the responsi-

bility of proving his innocence which clearly contravenes the U. S. Constitution and the decisions of this Court referred to infra.

Johnson v. Zerbst, 302 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527;
Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

If the accused was denied the assistance of counsel, the trial court was without jurisdiction. The fact that an invalid conviction resulted does not change the burden of proof in a subsequent proceeding involving the same charge.

CONCLUSION

For the reasons set forth above, petitioner urgently prays that a Writ of Certiorari issue from this Court to review the judgment of the Supreme Court of Minnesota.

Respectfully submitted,

RISCHMILLER & WASCHE
BY ROBERT WM. RISCHMILLER
302 Minnesota Federal Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner

APPENDIX A

STATE of Minnesota ex rel. Arthur B. KONS, Appellant,

v.

Ralph H. TAHASH, Warden Minnesota State Prison, Respondent.

No. 40844.

Supreme Court of Minnesota.

Oct. 4, 1968.

The District Court of Washington County, Robert B. Gillespie, J., denied petition for writ of habeas corpus, and relator appealed. The Supreme Court, Otis, J., held, inter alia, that where there was no showing that facts constituting offense were inconsistent with charge to which defendant pled guilty, failure of trial court to elicit from defendant "his detailed account of the facts indicating his guilt", as required by statute, did not require that defendant be resentenced.

Affirmed.

1. Criminal Law (key) 980(1)

Where there was no showing that facts constituting offense were inconsistent with charge to which defendant pled guilty, failure of trial court to elicit from defendant "his detailed account of the facts indicating his guilt", as required by statute, did not require that defendant be resentenced. M.S.A. § 243.49.

2. Criminal Law (key) 273,980(1)

Statute providing that plea of guilty shall be entered by

defendant rather than by his attorney is directory and not mandatory, and accordingly, its violation did not require resentencing of defendant whose plea was taken by his attorney in open court and in defendant's presence. M.S.A. § 630.29.

3. Criminal Law (key) 998(1, 16)

A postconviction proceeding is a colateral attack on a judgment which carries presumption of regularity and which, therefore, cannot be lightly set aside.

4. Habeas Corpus (key) 85.1(3)

Strong showing of incompetence is required to rebut presumption that defendant was properly advised by his attorney.

5. Habeas Corpus (key) 85.5(11)

Relator, who brought habeas corpus proceedings twenty-seven years after he was convicted and sentenced on plea of guilty, failed to sustain his burden of showing that his representation was so perfunctory and casual as to render the proceedings a sham and pretence, or a farce or mockery of justice.

6. Habeas Corpus (key) 113(12)

Findings of habeas corpus court are entitled to great weight and will not be set aside on bald assertion of relator that he was inadequately represented at trial, especially where there is no claim of innocence.

7. Criminal Law (key) 274

Unless defendant is denied constitutional right which is

prejudicial and casts doubt on his guilt or innocence, procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice has resulted.

8. Criminal Law (key) 1162

Not every denial of a constitutional right is prejudicial.

Syllabus by the Court

1. Where there is no showing that the facts constituting the offense are inconsistent with the charge to which defendant has pled guilty, the failure of the trial court to elicit from defendant "his detailed account of the facts indicating his guilt" as required by Minn. St. 1959, § 640.10 (now repealed), does not require that defendant be resentenced.

2. Minn. St. 630.29, which provides that a plea of guilty shall be entered by the defendant rather than by his attorney, is directory and not mandatory. Consequently, its violation does not require that defendant be resentenced if his plea was taken in open court and in his presence.

3. Unless defendant is denied a constitutional right which is prejudicial and casts doubt on his guilt or innocence, procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted.

Rischmiller & Wasche, Minneapolis, for appellant.

Douglas M. Head, Atty. Gen., Richard H. Kyle, Sol. Gen., David J. Byron, Special Asst. Atty. Gen., St. Paul, for respondent.

OPINION

OTIS, Justice.

These habeas corpus proceedings seek to review a conviction for murder in the second degree based on an arraignment and plea of guilty entered on January 13, 1941, which resulted in a life sentence. The issues are: (1) Whether the court's failure to interrogate relator with respect to the facts of the crime requires a remand and rearraignment; (2) whether the proceedings were fatally defective because the plea of guilty was entered by counsel and not by relator; and (3) whether or not defendant was deprived of his constitutional right to counsel by the brevity of his consultation with his attorney.

At the outset we acknowledge a concern, shared by the lower court, with respect to the cursory manner in which the trial court conducted the arraignment. The procedures followed fell short of what is ordinarily to be expected in charging a defendant with a crime of this gravity. Nevertheless we have concluded that the record as a whole does not compel a finding that defendant was denied his constitutional rights or that the conviction constituted a miscarriage of justice.

At the habeas corpus hearing, the relator made sweeping claims regarding his record and the events which occurred at the arraignment, nearly all of which were subsequently retracted or conclusively impeached. As a result, the trial court rejected all of relator's testimony except as it was "corroborated by other believable testimony." In effect, relator initially testified that he had no prior felony convictions, that he pled not guilty at the arraignment, that he did not sign a confession, and that he objected to the plea of guilty entered for him by his attorney.

The crime for which relator was convicted occurred on December 11, 1940, in Goodhue County. Relator was taken into custody near Stevens Point, Wisconsin, by Minnesota officers on January 9, 1941, and was removed to Red Wing, Minnesota, the following day without formal extradition.[1] On January 13, 1941, a grand jury was convened in Goodhue County, and at about 2:20 p. m. brought in an indictment charging relator with murder in the second degree arising out of the death of one Martin Wangen. Shortly thereafter, on the same afternoon, relator was arraigned. The court, having determined that relator wished to be represented and that he was without means to employ his own counsel, directed the appointment of an attorney then present in the courtroom. The following colloquy appears in the official transcript of the proceedings:

> "THE COURT: The Court will appoint Mr. Clinton H. Bentley to act as your attorney under the Statute. Mr. County Attorney, will you have Mr. Bentley come up at once.
>
> "* * *
>
> "(MR. CLINTON H. BENTLEY appears as attorney on behalf of the Defendant.)
>
> "MR. HOLST: May it please the Court, at this time I move the arraignment of Mr. Arthur Kons.
>
> "THE COURT: Mr. Kons, you may step forward. You have been indicted under the name of Arthur B. Kons, also known as Arthur Kons, also known as Albert B. Miller. What is your true name?
>
> "DEFENDANT: Arthur Kons.

---

[1]Relator does not press the issue concerning the the propriety of his removal because that question was not raised at the time of his arraignment. *State v. Porter*, 274 Minn. 419, 144 N.W.2d 260.

"THE COURT: Mr. Clerk, would you read this indictment?

"(Indictment read by Clerk of Court)

"THE COURT: Is the defendant prepared to plead to this indictment?

"MR. BENTLEY: He is, your Honor.

"THE COURT: Does he plead guilty or not guilty?

"MR. BENTLEY: He pleads guilty, your Honor.

"THE COURT: It may be noted that the defendant pleads that he is guilty of the offense charged in the Indictment. The defendant will be sworn to answer questions.

"THE CLERK: The defendant has already been sworn.

"(Defendant takes the witness stand.)"

Relator then acknowledged among other things convictions for larceny and robbery, arson, a second robbery, and assault of a prison guard, apparently in an escape attempt. At the conclusion of the proceedings, the county attorney moved that relator be sentenced, at which point the court stated: "Do you know of any reason why sentence should not be pronounced upon you, Mr. Kons?" Defendant replied, "No, sir." Thereupon, a life sentence was imposed to which were attached the following impressions of the court: "A strong criminal type. The Court makes no recommendations as to leniency."

[1] 1. At the time of relator's conviction, Mason St. 1927, § 10797 (later Minn. St.1959, § 640.10) provided that "in cases in which the convict pleads guilty, his detailed account of the facts indicating his guilt" shall be in-

cluded in the record.[2] We have been cited no authority for the proposition that it is prejudicial error to omit inquiry into the facts of the crime at the time of arraignment. We decline to hold that the oversight is one which requires resentencing. Subject to the defendant's right against self-incrimination, it is good practice for the court to hear from defendant concerning the facts of the offense in order to satisfy the court that the plea of guilty is consistent with the circumstances giving rise to the conviction. In addition, it may bear on the kind of sentence which will be imposed. This view is fortified by American Bar Association, Standards Relating to Pleas of Guilty (tentative draft), § 1.6, which states:

> "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea."

The following reasons for the standard are found in Standards with Commentary, § 1.6, p. 32:

> "* * * First and foremost, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Secondly, investigation into the factual basis of guilty pleas acts to increase the visibility of charge reduction practices, a common form of plea agreement. In ad-

---

[2]L.1961, c. 602, amended the statute with respect to the necessity for a detailed account of the facts and substituted the phrase "testimony concerning his guilt." Thereafter, Minn.St. 640.10 was renumbered as Minn.St. 243.49 and again amended by L.1965, c. 869, § 15. That amendment deleted the phrase "his testimony concerning his guilt" and provided "in cases in which the person pleads guilty, a transcript of the proceedings relative thereto" shall be included in the record.

> dition, these inquiries provide a more adequate record of the conviction process; this record minimizes the chances of a defendant successfully challenging his conviction later, e. g., see McGrady v. Cunningham, 296 F.2d 600 [96 A.L.R 2d 1286] (4th Cir. 1961), and also aids correctional agencies in the performance of their functions. Finally, increased knowledge about the circumstances of the defendant's offense provides the court with a beter assessment of defendant's competency, his willingness to plead guilty, and his understanding of the charges against him. NEWMAN ch. 1."

However salutary the rule may be, we find no prejudice in the court's failure to inquire about the facts of the crime. Nothing in the record, either at the initial proceedings or at the habeas corpus hearing, suggests that a disclosure of the circumstances would have prevented the court from accepting a plea of guilty. Indeed, the inferences are all to the contrary. For these reasons, we hold that failure to comply with Minn.St. 640.10 does not require a resentencing.

2. Relator complains of the court's neglecting to comply with Minn.St. 630.29 at the time of arraignment. That statute reads as follows:

> "A plea of guilty can in no case be put in except by the defendant himself in open court, unless upon an indictment against a corporation, in which case it may be put in by counsel. At any time before judgment the court may permit it to be withdrawn and a plea of not guilty substituted."

Again, the danger of failing to elicit the plea from defendant himself is obvious, more particularly when the charge is

murder and defendant faces a life sentence. Apart from its being a violation of the statute, the procedure here followed offends sound judicial policy. American Bar Association, Standards Relating to Pleas of Guilty (tentative draft), § 1.1, provides in part:

> "* * * A plea of guilty or nolo contendere should be received only from the defendant himself in open court, * * *."

The Commentary, § 1.1(a), notes:

> "* * * At common law, an attorney for the defendant could not plead guilty for the defendant, even when the defendant stood by in apparent acquiescence. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 294 (1947). The Advisory Committee prefers the latter rule because it avoids the difficult problem for appellate courts of determining whether, by his silence or some other conduct, the defendant actually acquiesced to the plea entered by counsel. See cases in Annot., 110 A.L.R. 1300 (1957). As one court observed, 'nothing should be left to implication' in such an important matter. People v. McCrory, 41 Cal. 458 (1871)."

Notwithstanding the court's acceptance of the plea from counsel, relator does not seriously contend that he misunderstood what transpired. On cross-examination at the habeas corpus hearing, the following testimony was elicited from relator:

> "Q. When did you first learn that you had been accused of murder in the second degree?

"A. When he read it in court there before the grand jury.

"Q. And your attorney was present?

"A. Yes.

"Q. And you heard him make his plea?

"A. He didn't make any plea.

"Q. He said that you were guilty, didn't he?

"A. Well, he said 'We plead guilty, Your Honor.'

"Q. Yes. And you heard him?

"A. I was going--going up to the stand and I didn't know what—what was going on there, and I had no way of objecting.

"Q. Well, I say you heard him?

"A. I had no way of objecting. He was my attorney.

"Q. You heard what he said?

"A. That's right.

"Q. And you made no objection to the Court that you did not plead guilty?

"A. I had no chance to object.

"Q. Well, you didn't, anyway, did you?

"A. No. It was up to the attorney to object, wasn't it?

"Q. *And you understood when the Court imposed sentence what it was, didn't you?*

"A. *Sure I knew what it was.*

"Q. He said that you were guilty?

"A. No.

"Q. And he said that the sentence was as follows, and then read the sentence, didn't he?

"A. I didn't say it. He said it.

"Q. And you heard what he said?

"A. That's right." (Italics supplied.)

At the time of this conviction, relator was 32 years of age and had been convicted of at least four serious felonies. He had spent nearly all of his adult life in prison. He had more than a causal familiarity with criminal processes. We find it difficult to believe he did not understand the nature of the plea which was being entered on his behalf.

[2] The same question was raised in State ex rel. Rajala v. Rigg, 257 Minn. 372, 379, 101 N.W.2d 608, 613. We there concluded that Minn.St. 630.29 is directory and not mandatory and its violation does not deprive the court of jurisdiction, provided the defendant is present and in open court when the plea is entered on his behalf.

3. In support of his claim that he had an inadequate opportunity to consult with his attorney and that he was not properly advised of his rights, relator calls attention to the fact that a period of only one hour and a half or two hours elapsed between the time he was indicted and the time he was actually committed to prison. It was his testimony that he consulted with his attorney for only 3 or 4 minutes before the plea was entered, and that the judge did not leave the bench while this was going on. The transcript does not show what length of time transpired between the time counsel was appointed and the time the plea was entered. It may be inferred, however, that whatever recess had occurred was not an extended one. Unfortunately, neither party saw fit to call defendant's counsel in rebuttal. His testimony would have been helpful to this court in reviewing the facts. State ex rel. Schuler v. Tahash, 278 Minn. 302, 307, 154 N.W.2d 200, 205. Relator testified that his attorney advised him of none of his rights and that he did not discuss the facts of the crime

with relator. As we previously indicated, the habeas corpus court held that relator's testimony was so conclusively impeached it refused to give weight to any of it, except as it was corroborated. We think the court was justified in reaching this conclusion and that the presumption that relator was adequately advised of his constitutional rights was not overcome.

[3-6] The instant case is not unlike that with which we dealt in State ex rel. Fruhrman v. Tahash, 275 Minn. 242, 250, 146 N.W.2d 174, 180. There we held the trial court was justified in not accepting defendant's assertion that his counsel failed to advise him of his rights during a 25-minute consultation. In affirming an order discharging a writ of habeas corpus, we stressed the fact that defendant did not clearly and unequivocally profess his innocence and that it was a relevant consideration that the defendant had waited 10 years to challenge his conviction. We have also recently reiterated the rule that a "post-conviction proceeding is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." State ex rel. Gray v. Tahash, 279 Minn. 248, 250, 156 N.W.2d 228, 229. There must be a strong showing of incompetence to rebut the presumption that a defendant was properly advised by his attorney. State ex rel. Adams v. Rigg, 252 Minn. 283, 89 N.W.2d 898, certiorari denied, 358 U.S. 899, 79 S.Ct. 224, 3 L.Ed.2d 149. We are not persuaded that relator has sustained his burden of showing his representation was perfunctory and casual as in State ex rel. Dehning v. Rigg, 251 Minn. 120, 86 N.W.2d 723, rendering the proceedings a sham and pretense, or a farce or mockery of justice as we stated in State v. Waldron, 273 Minn. 57, 139 N.W.2d 785. The findings

of the habeas corpus court are entitled to great weight and will not be set aside on the bald assertion of relator that he was inadequately represented, more especially where there is no claim of innocence. State ex rel. Dillard v. Tahash, 265 Minn. 322, 121 N.W.2d 602.

[7, 8] There may be circumstances where even after a delay of 27 years the court will permit a plea of guilty to be withdrawn if defendant has been denied a constitutional right which is prejudicial and casts doubt on his guilt or innocence.[3] With respect to the instant case, however, we hold that the procedural deficiencies do not require a reversal. Defendant was present and heard the plea of guilty entered. His attorney stated he was prepared to plead and relator did not demur. Before sentence was pronounced, he was given an opportunity to speak. He was a mature person, well versed in criminal procedure. While the trial court did not have before it relator's confession, it was introduced and received in the habeas corpus proceedings. Relator admitted the signature attached was his but denied he had affixed it. The confession recites in detail relator's version of two brutal shootings and robberies, one of which resulted in this prosecution for murder and neither of which defendant has in any way denied. We are not persuaded there has been a miscarriage of justice. The order discharging the writ of habeas corpus is therefore affirmed.

Affirmed.

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[3]Not every denial of a constitutional right is prejudicial. *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, rehearing denied, 386 U.S. 987, 87 S.Ct. 1283, L.Ed.2d 241.

APPENDIX B

STATE OF MINNESOTA, County of Washington. DISTRICT COURT. 10th Judicial District.

STATE OF MINNESOTA, ex rel. ARTHUR B. KONS, Petitioner.

vs.

RALPH H. TAHASH, Warden, Minnesota State Prison, Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before the undersigned, one of the judges of this Court, on April 12, 1966, at 2:30 p. m. in Stillwater, Minnesota upon the petition of Arthur B. Kons for a writ of habeas corpus, which writ was ordered by the Court and made returnable on April 12, 1966, at 2:30 p. m. This was a continued hearing, with the initial hearing had at Anoka, Minnesota on March 19, 1965. Pursuant to said writ, the respondent duly made his return and produced the petitioner in person before the Court on the date aforesaid, and his counsel, Robert Wm. Rischmiller, Esq., was also present and represented petitioner. The respondent appeared by Gerard W. Snell, Esq., Acting Solicitor General.

The petitioner testified in his own behalf and in support of his petition, and upon all the evidence adduced in open court at said hearing and the records and files therein; the petition, respondent's return, petitioner's traverse of the return, and the exhibits received, and the briefs submitted by the respective parties, and after fully considering all

thereof, the Court makes and files the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. That respondent is the Warden of the Minnesota State Prison at Stillwater, Minnesota, an institution established by law for the confinement of felons.

2. That on January, 13, 1941, the grand jury in the District Court of Goodhue County, Minnesota, duly organized and then existing, returned and filed in said court an indictment charging Arthur B. Kons, the petitioner herein, with the crime of murder in the second degree.

3. That on the 13th day of January, 1941, in the District Court of Goodhue County, Minnesota, the petitioner herein was brought before such court, Honorable Charles P. Hall presiding. That at which time the court appointed Mr. Clinton H. Bentley to act as attorney on behalf of the petitioner. Petitioner was duly arraigned on said indictment and entered a plea of guilty thereto, whereupon the court adjudged the petitioner to be guilty and sentenced him to confinement for life in the Minnesota State Prison.

4. That on January 13, 1941, in the court aforesaid, a commitment was duly issued, directed to the sheriff of the county aforesaid and to the Warden of the Minnesota State Prison. That such commitment was delivered to the Sheriff of Goodhue County, Minnesota, and thereupon such sheriff conveyed the body of the petitioner herein to the state prison at Stillwater, Minnesota, and delivered such body to the warden of the prison aforesaid and such warden received the body of the petitioner and ever since has kept him as a prisoner in such prison in pursuance of all

of the proceedings aforesaid. From such imprisonment, the petitioner aforesaid has never been discharged by due process of law or by competent authority.

5. For the reasons set forth in these findings and together with the memorandum attached hereto and made a part hereof, the Court finds that the petitioner is entitled to no relief.

Pursuant to the foregoing findings of fact, and the Court makes the following

CONCLUSIONS OF LAW

1. That the petitioner is in the lawful custody of the respondent Warden of the Minnesota State Prison.

2. That petitioner is not entitled to his release from the custody of the said respondent Warden of the Minnesota State Prison.

3. That petitioner is denied any and all relief demanded in his petition.

Pursuant to the foregoing findings of fact and conclusions of law, the Court makes the following

ORDER

It Is Hereby Ordered that the Writ of Habeas Corpus heretofore issued be and same is hereby dismissed and discharged on the merits, and petitioner is remanded to the custody of the respondent warden.

Dated at chambers at Stillwater, Minnesota, this 10th day of March, 1967.

ROBERT B. GILLESPIE,
Judge of the District Court.

MEMORANDUM

This case has presented some problems to the undersigned. Petitioner rests his sole claim now upon the fact that he was not advised of his constitutional rights and did not have adequate counsel at the time of his plea. The record of his arraignment upon the indictment returned at 2:20 p. m. on January 13, 1941, does indicate that he was immediately, after the return of the indictment, taken before the Court, where an attorney was appointed and only a short conference was had between petitioner and his attorney, after which the indictment was read and petitioner's attorney entered a guilty plea. Because of the short period of time for consultation there is raised a serious question of whether counsel had a sufficient time to adequately advise petitioner of his constitutional rights. However, this Court relies upon the presumption that counsel did advise petitioner of his rights. Adams v. Rigg, 252 Minn. 283, Anderson v. Tahash, 273 Minn. 499, Rankin v. Tahash, Minn. 2-17-67. The petitioner's testimony in the evidentiary hearing is totally rejected by this Court except where corroborated by other believable testimony. His petition contains sworn statements which were patently fake such as: "Bentley was an assistant county attorney when he represented me"; "I pled not guilty at arraignment"; "No attorney appointed until after arraignment"; "I objected to plea of guilty"; "I deny signing a confession"; "Transcript false and untruthful"; "does not have past criminal record as stated in transcript" and "admitted to Stillwater at 11:10 a. m. on January 13, 1941." All of the foregoing statements of petitioner, made under oath, have been proven to be false and without foundation. Therefore, this Court rejects petitioner's statement that he was not advised of his constitutional rights by Bentley and also re-

jects his claim of request for counsel prior to arraignment.

The sentencing court was not dealing with a novice in the criminal trade. Petitioner had been four times convicted of serious offenses: (1) Larceny and robbery (2) Arson (3) Robbery and (4) Assault of a prison guard. He spent at least nine years in prison and it is fair to assume became (during that time) fully acquainted with a defendant's rights in a criminal case. The Court gave him an opportunity to object to the sentencing procedure when he asked petitioner: "Do you know of any reason sentence should not be pronounced?" to which petitioner replied: "No, Sir."

Petitioner had made a full confession of the crime for which he was sentenced. His denial of the same bears no weight in view of the testimony of Mr. Holst and the handwriting expert who examined the signatures to the confession.

Unfortunately the sentencing court in 1941 did not follow the practice of the courts in recent years of interrogating a defendant in full with regard to his knowledge of the offense charged, his participation therein and his awareness of his right to trial by jury and other constitutional rights. The absence of such knowledge and advice must be proven by petitioner and he has failed to do so. His bare assertions are not sufficient in view of the lack of weight of his testimony and the weight which must be given to the other testimony in the case. In no way has petitioner shown that more time to confer with counsel would have been beneficial to his case. It may be noted that petitioner's attorney, Mr. Bentley, was not called by him as a witness in the hearings before the undersigned.

R.B.G.

ROBERT B. GILLESPIE.

REME COURT. U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 893

Supreme Court, U.S.
FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

STATE OF MINNESOTA EX REL.
ARTHUR B. KONS

Petitioner,

vs.

RALPH H. TAHASH, WARDEN,
MINNESOTA STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

DOUGLAS M. HEAD
Attorney General
State of Minnesota
RICHARD H. KYLE
Solicitor General
ARNE L. SCHOELLER
Assistant Attorney General
Counsel of Record
DAVID J. BYRON
Special Assistant
Attorney General
Attorneys for Respondent
160 State Office Building
St. Paul, Minnesota 55101
Telephone: 612-221-2961

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IN THE

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vs.

RALPH H. TAHASH, WARDEN,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. In a state habeas corpus proceeding involving an attack on a 1941 murder conviction, did petitioner, solely on the basis of his own uncorroborated assertions and without calling counsel who was available, establish by a preponderance of the evidence that he was denied the adequate assistance of counsel?

State court held: negative.

2. Did state violate petitioner's constitutional right to assistance of counsel in a habeas corpus case where it stated:

> "Unless defendant is denied a constitutional right which is prejudicial and casts doubt on his guilt or innocence, procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted."?

STATEMENT OF FACTS

At the outset respondent calls attention to the fact that petitioner, both in his statement of questions presented and in his statement of facts, asserts as fact, matters based solely upon his unsupported allegations which were not believed either by the state district court or the state supreme court.

On January 13, 1941, petitioner was sentenced to life imprisonment following his conviction after a plea of guilty to an indictment charging him with the crime of murder in the second degree. The indictment charged the commission of the crime in substantially the following manner:

> ". . . Arthur B. Kons, . . . on the 11th day of December, A.D. 1940 at the Township of Stanton in the County of Goodhue, State of Minnesota wilfully, unlawfully, wrongfully, and feloniously, without authority of law, without justification, or excuse and without deliberation

or premeditation, and with a design on the part of him, the said Arthur B. Kons, to effect the death of a human being, to-wit: Martin Wangen, assault, kill, and murder said Martin Wangen by then and there shooting him, the said Martin Wangen with a loaded firearm, to-wit: a 32 calibre revolver and thereby inflicting upon the head, body, and person of said Martin Wangen, mortal wounds and injuries and from which wounds and injuries so inflicted by said Arthur B. Kons, said Martin Wangen did die in said County of Goodhue, State of Minnesota, on the 11th day of December, 1940, ..."

Twenty three years later, on September 15, 1964, Kons filed a petition for a writ of habeas corpus, in the Minnesota district court, claiming a denial of constitutional rights. He alleged that he was denied the benefit of adequate and effective counsel in the proceeding leading to his conviction. Evidentiary hearings were held on March 19, 1965, and again April 12, 1966.

The arraignment record disclosed that upon a finding that petitioner was without funds to retain his own legal counsel, the trial court had appointed Mr. Clinton H. Bentley to represent him. Upon his appointment the record further shows that a recess in the proceedings was taken during which petitioner conferred with his counsel. The record does not indicate the length of this conference. Only petitioner testified at the habeas hearing as to the length and content of this conference. After stating in his petition that the guilty plea was entered by counsel "immediately . . . without consulting petitioner", Kons testified at the hearings that he had conferred with counsel, but not for more than three or four minutes or five minutes (H.C.$_1$ 33; H.C.$_2$ 6). Petitioner also testified that in his

conference with Mr. Bentley, there was no discussion at all about the crime. (H.C.$_1$ 36). Mr. Bentley, although available, was not called by the petitioner to corroborate any of his claims.

Upon a finding that the petitioner's allegation that he was denied his constitutional rights should be rejected, the state district court denied the petition, explaining:

> "This case has presented some problems to the undersigned. Petitioner rests his sole claim now upon the fact that he was not advised of his constitutional rights and did not have adequate counsel at the time of his plea. The record of his arraignment upon the indictment returned at 2:20 p.m. on January 13, 1941, does indicate that he was immediately, after the return of the indictment, taken before the Court, where an attorney was appointed and only a short conference was had between Petitioner and his attorney, after which the indictment was read and Petitioner's attorney entered a guilty plea. Because of the short period of time for consultation there is raised a serious question of whether counsel had a sufficient time to adequately advise Petitioner of his constitutional rights. However, this Court relies upon the presumption that counsel did advise Petitioner of his rights. Adams vs. Rigg, 252 Minn. 283; Anderson vs. Tahash, 273 Minn. 499; Rankin vs. Tahash, Minn. 2-17-67. The Petitioner's testimony in the evidentiary hearing is totally rejected by this Court except where corroborated by other believable testimony. His petition contains sworn statements which were patently fake such as: 'Bentley was an assistant county attorney when he represented me'; 'I pled not guilty at arraignment'; 'No attorney appointed until after arraignment,; 'I objected to plea of guilty,; 'I deny

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"The sentencing court was not dealing with a novice in the criminal trade. Petitioner had been four times convicted of serious offenses: (1) Larceny and robbery, (2) Arson, (3) Robbery, and (4) Assault of a prison guard. He spent at least nine years in prison and it is fair to assume became (during that time) fully acquainted with a defendant's rights in a criminal case. The Court gave him an opportunity to object to the sentencing procedure when he asked Petitioner: 'Do you know of any reason sentence should not be pronounced?' to which Petitioner replied: 'No, sir.'

"Petitioner had made a full confession of the crime for which he was sentenced. His denial of the same bears no weight in view of the testimony of Mr. Holst and the hand-writing expert who examined the signatures to the confession.

"Unfortunately the sentencing court in 1941 did not follow the practice of the courts in recent years of interrogating a defendant in full with regard to his knowledge of the offense charged, his participation therein and his awareness of his right to trial by jury and other constitutional rights. The absence of such knowledge and advice must be proven by Petitioner and he has failed to do so.

> His bare assertions are not sufficient in view of the lack of weight of his testimony and the weight which must be given to the other testimony in the case. In no way has petitioner shown that more time to confer with counsel would have been beneficial to his case. It may be noted that Petitioner's attorney, Mr. Bentley, was not called by him as a witness in the hearing before the undersigned."

On appeal to the Minnesota Supreme Court, the court reviewed the record and determined the evidence supported the conclusion that the presumption that petitioner was adequately advised of his constitutional rights was not overcome. In reaching this conclusion, the state supreme court commented:

> "[T]he habeas corpus court held that relater's testimony was so conclusively impeached it refused to give weight to any of it, except as it was corrobrated. We think the court was justified in reaching this conclusion. . . ." (Petitioners Brief A. 12)

ARGUMENT

I

The Minnesota Supreme Court Properly Found That The Petitioner In A 1964 State Habeas Corpus Proceeding Failed To Establish By A Preponderance Of The Evidence That He Was Denied Adequate Assistance Of Counsel In The Proceedings Leading To His 1941 Murder Conviction.

In considering petitioner's contention that he did not receive adequate assistance of court appointed legal counsel, both the state district court and the state supreme court properly proceeded on the basis that the burden was on the petitioner to prove his allegations. *Wilson v. Rose*, 366 F. 2d 611 (9th Cir. 1966); *U. S. ex rel. Marshall v. Wilkins*, 338 F. 2d 404 (2nd Cir. 1964); *U. S. ex rel. Conroy v. Pate*, 240 F. Supp. 237 (D.C. Ill. 1965). Petitioner must prove his allegation by a preponderance of the evidence. *Walker v. Beto*, 387 F. 2d 626 (5th Cir. 1967); *U.S. ex rel. Brennan v. Fay*, 353 F. 2d 56 (2nd Cir. 1965); *Hall v. Warden*, 313 F. 2d 483 (4th Cir. 1963), cert. den.; *Pepersack v. Hall*, 374 U.S. 809, 83 S. Ct. 693. Additionally the Minnesota courts gave effect to the presumption of regularity which attaches to a judgment of conviction when it is attacked collaterally. *Baez v. Rodriguez*, 381 F. 2d 35 (10th Cir. 1967); *Huffman v. Beto*, 260 F. Supp. 63 (D.C. Tex. 1966); *Paul v. Waters*, 109 F. Supp. 195, affirmed 204 F. 2d 510 (10th Cir. 1953). This presumption of regularity may only be overcome by competent evidence, and it may not be lightly set aside on collateral attack by way of habeas corpus. *Huffman v. Beto, supra*; *U. S. ex rel. Dugger v.*

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I

The Minnesota Supreme Court Properly Found That The Petitioner In A 1964 State Habeas Corpus Proceeding Failed To Establish By A Preponderance Of The Evidence That He Was Denied Adequate Assistance Of Counsel In The Proceedings Leading To His 1941 Murder Conviction.

In considering petitioner's contention that he did not receive adequate assistance of court appointed legal counsel, both the state district court and the state supreme court properly proceeded on the basis that the burden was on the petitioner to prove his allegations. *Wilson v. Rose,* 366 F. 2d 611 (9th Cir. 1966); *U. S. ex rel. Marshall v. Wilkins,* 338 F. 2d 404 (2nd Cir. 1964); *U. S. ex rel. Conroy v. Pate,* 240 F. Supp. 237 (D.C. Ill. 1965). Petitioner must prove his allegation by a preponderance of the evidence. *Walker v. Beto,* 387 F. 2d 626 (5th Cir. 1967); *U.S. ex rel. Brennan v. Fay,* 353 F. 2d 56 (2nd Cir. 1965); *Hall v. Warden,* 313 F. 2d 483 (4th Cir. 1963), cert. den.; *Pepersack v. Hall,* 374 U.S. 809, 83 S. Ct. 693. Additionally the Minnesota courts gave effect to the presumption of regularity which attaches to a judgment of conviction when it is attacked collaterally. *Baez v. Rodriguez,* 381 F. 2d 35 (10th Cir. 1967); *Huffman v. Beto,* 260 F. Supp. 63 (D.C. Tex. 1966); *Paul v. Waters,* 109 F. Supp. 195, affirmed 204 F. 2d 510 (10th Cir. 1953). This presumption of regularity may only be overcome by competent evidence, and it may not be lightly set aside on collateral attack by way of habeas corpus. *Huffman v. Beto, supra*; *U. S. ex rel. Dugger v.*

Murphy, 219 F. Supp. 596 (D.C. N.Y. 1963). The Minnesota Supreme Court found that petitioner's bald, uncorroborated assertions, most of which were conclusively impeached by the record itself, were not sufficient to satisfy his burden of proof and thus did not overcome the presumption of regularity. A review of all the files and records clearly supports the finding of the Minnesota Court. The record itself discloses that counsel was appointed to represent petitioner prior to this plea and that thereafter counsel conferred with petitioner. In the absence of an affirmative showing to the contrary there is a controlling presumption that court-appointed counsel conferred with and advised the accused of his rights. *State ex rel. Adams v. Rigg*, 252 Minn. 283, 89 N.W. 2d 898, cert. den. 358 U.S. 898, 79 S. Ct. 224, 3 L. Ed. 2d 149. This presumption is of course only overcome by clear and convincing evidence, and where, as here, counsel although available was not called to corroborate petitioner's assertions, the trial court must give close scrutiny to the entire record and make a judgment on the petitioner's credibility. *State ex rel. Schuler v. Tahash*, 278 Minn. 302, 154 N.W. 2d 200 (1967). Following petitioner's conference with counsel, the court was informed that petitioner was ready to plead, the indictment was read and counsel entered a guilty plea on petitioner's behalf in the presence of petitioner. Though petitioner alleged at the habeas hearing twenty-four years later that he had not acquiesced in the decision to plead guilty, the record discloses that he made no objection when the plea was entered. Further when the court asked: "Do you know of any reason why sentence should not be pronounced upon you, Mr. Kons?", the petitioner responded: "No, sir." The unsupported assertions of petitioner are not sufficient to overcome the presumption of regularity which attaches to the original proceedings.

It should be noted that the record of this original proceeding clearly refutes several of petitioner's claims: that he entered a not guilty plea, that he objected to the appointment of Mr. Bentley as his counsel, that the indictment was issued after the arraignment and sentence, that no attorney was appointed until after arraignment, and that the record was not a complete transcription of the arraignment proceeding. (H.C.$_1$ 32).

Many of the allegations raised under oath either in the petition or in petitioner's testimony were demonstrated to be false in the habeas proceeding. In the petition the claim was made that petitioner was admitted to Stillwater Prison at 11:10 A. M. on January 13, 1941. The testimony of Roy Farnham, prison records officer disclosed that the admission was not until late in the afternoon and petitioner himself testified that he did not return to his jail cell from court until noon or a little after on that day. (H.C.$_1$ 37). Petitioner also testified at the hearing that he had not signed the confession given to the County Attorney. He stated that though the signature appearing on the last page of the confession was his signature, he did not put it there. (H.C.$_1$ 49). This assertion was proven to be patently false by the testimony of the County Attorney who took the confession (H.C.$_1$ 92), the testimony of Roy F. Farnham of the Minnesota State Prison who was acquainted with petitioner's signature (H.C.$_1$ 126), and by the testimony of Milton Flohr, a handwriting expert (H.C.$_2$ 26). The handwriting expert testified upon the order of the court and it is apparent that the court relied heavily on the evidence determining the question of whether the signature was that of petitioner in weighing all evidence presented at the hearing. (See Order of Judge Gillespie dated March 25, 1965, (Peti-

tioner's Brief B-4)) Petitioner did not produce any evidence to challenge the conclusions of the handwriting expert.

Another assertion made by petitioner at the habeas hearing was that only the first one and one-half pages of the confession resulted from answers given by him. A mere reading of this statement demonstrates how preposterous this assertion is. First, one cannot help but notice the convenient cut-off point selected by petitioner. Secondly, the detailed description of petitioner's activities over the years could only have come from petitioner himself.

Perhaps the best indication of just how incredible petitioner's stories are is demonstrated by his assertions, both in his petition and at the habeas hearing, that he had never before been convicted of a crime. Petitioner's prior convictions for (1) Larceny and robbery, (2) Arson, (3) Robbery, and (4) Assault of a prison guard, are a matter of record. Whether petitioner's assertions resulted from an unwillingness to tell the truth or merely from the confused state of his mind, the effect upon the credibility of all his assertions is the same.

In a habeas corpus proceeding the trier of fact is not obligated to accept all of the bald uncorroborated assertions of the petitioner. Federal courts have recognized in many instances that the fact finder in a habeas corpus evidentiary hearing is not required to believe the uncorroborated testimony of the petitioner even where no evidence to the contrary has been introduced. *Walker v. Beto, supra; U. S. ex rel. Dugger v. Murphy, supra*; *Ex Parte Farrell,* 189 F. 2d 540 (1st Cir. 1951), cert. den., 342 U.S. 839, 72 S. Ct. 64; *U. S. ex rel. Angel v. Shaughnessy,* 121 F. Supp. 284 (D.C. N.Y. 1954); *Jackson v. Sanford,* 79 F. Supp. 74 (D.C. Ga. 1948). In *Walker v. Beto, supra,* the petitioner sought to upset a 1946 robbery conviction by way of a habeas corpus action instituted

nineteen years later in 1965. The 5th Circuit Court of Appeals, in commenting upon the testimony adduced at the evidentiary hearing said (387 F. 2d at 627):

> "Walker relied solely on his own testimony at the evidentiary hearing granted by the District Judge. The burden was on him to show by a preponderance of the evidence that he was entitled to the writ, Williams v. Beto, 5 Cir., 1965, 354 F. 2d 698, Welch v. Beto, 5 Cir., 1966, 355 F. 2d 1016. The District Judge, as the fact finder, was not required to believe the uncorroborated testimony of the petitioner, even though no evidence to the contrary had been (or could have been) adduced, Hawk v. Olson, 326 U. S. 271, 279, 66 S. Ct. 116, 90 L. Ed. 61 (1945). This record reveals that in crucial instances Walker's testimony was vague, indefinite, self contradictory, and refuted by the official records."

In *Dugger v. Murphy, supra,* the court, in 1963, considered an attack on a 1947 conviction and noted that where petitioner alone testified in support of his allegations the court was not required to believe him. The court also noted that petitioner's proclivity for falsehood, deception and crime, though not conclusive, must be weighed on credibility in the search for the truth as to what happened in 1947.

In the instant case petitioner alone testified as to the adequacy of his conferences with counsel. His testimony was impeached by the record which demonstrated petitioner's understanding of the nature of the charge and the consequences of his plea. Although petitioner's counsel fortunately was available twenty-three years after the conviction, petitioner chose not to seek to corroborate his allegations and did not call counsel to testify. Because of this and petitioner's demon-

strated untruthfulness with respect to such factors as his extensive prior criminal record, his plea at the time of arraignment, his signing of a confession and his acquiescence in the guilty plea, the state district court determined that his testimony, except where corroborated by other believable testimony, must be rejected. The state supreme court after a full review of the record of the evidentiary hearing determined that the district court was justified in its conclusion.

Respondent submits that petitioner, even after delaying twenty-three years to attack his conviction, has been given full opportunity to demonstrate his allegation that he was denied adequate counsel, and has failed to satisfy his burden of proof on the issue.

II

The Minnesota Supreme Court Did Not Hold That Petitioner Was Required To Offer Evidence Casting Doubt On His Guilt In Order To Prevail On The Denial Of A Constitutional Right.

Petitioner alleges that the Minnesota Supreme Court required him to offer evidence casting doubt upon his guilt as well as establishing the denial of his constitutional right to the adequate assistance of counsel. While the Minnesota Supreme Court acknowledged that the record left no doubt as to petitioner's guilt, it is clear from the opinion the court simply found that petitioner had not been denied his constitutional right to adequate counsel, guilt or innocence notwithstanding. The opinion very directly states (see p. A-4 of petitioner's brief):

> "[W]e have concluded that the record as a whole does not compel a finding that defendant was denied his constitutional rights or that the conviction constituted a miscarriage of justice."

Though it did not form the basis of the State Supreme Court's decision in this case, it is true, as recognized by this Court and by the State Supreme Court in its opinion, that not every denial of a constitutional right is prejudicial. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, rehearing denied 386 U.S. 987, 87 S. Ct. 1283. If a denial of a constitutional right is found a further inquiry to ascertain prejudice must be made and, in many instances, a consideration as to doubt concerning guilt is relevant in ascertaining prejudice or harmless error. While guilt or innocence is not controlling on a question of harmless constitutional error, it certainly may be con-

sidered in a review of the entire record. In *Johnson v. Burke*, 238 F. Supp. 104 (E.D. Wis. 1965), cert. denied 381 U.S. 932, 85 S. Ct. 1793, the federal district court, in dismissing an allegation of incompetent counsel, commented that there was no claim that the petitioner had any defense to the charge. In *Beckett v. Boles*, 218 F. Supp. 692 (D.C. W.Va. 1963), the petitioner, who had pled guilty to the crime of breaking and entering, sought a writ of habeas corpus alleging the incompetence of counsel. The federal district court denied relief and commented:

> "It is apparent that Beckett had no defense to the charge upon which he was arraigned, and (quoting from Turner v. State of Maryland, 318 F. 2d 852 (4 Cir. 1963)) 'In these circumstances there is no ground for saying that the legal representation afforded Turner' (Read Beckett) '(w)as so inadequate as to warrant the invalidation of his conviction and sentence.' "

The mere reference to the guilt or innocence of a habeas corpus petitioner does not taint the decision of a district court or a court of review. This is certainly true in the instant case where the State Supreme Court expressly concluded that petitioner had not been denied his constitutional rights.

CONCLUSION

Respondent respectfully submits a review of the entire record clearly supports the conclusion of the Minnesota District Court and the Minnesota Supreme Court that petitioner's unsupported assertions were not to be believed and failed to establish the denial of adequate assistance of counsel in petitioner's 1941 murder conviction. Additionally, respondent submits that the State Supreme Court did not require evidence

casting doubt on petitioner's guilt in order to establish a denial of a constitutional right.

Wherefore respondent requests this Court to deny the petition for a writ of certiorari to the Supreme Court of the State of Minnesota.

Respectfully submitted,

DOUGLAS M. HEAD
Attorney General
State of Minnesota
RICHARD H. KYLE
Solicitor General
ARNE L. SCHOELLER
Assistant Attorney General
Counsel of Record
DAVID J. BYRON
Special Assistant
Attorney General
Attorneys for Respondent
160 State Office Building
St. Paul, Minnesota 55101
Telephone: 612-221-2961